FILED

No. (1)

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In The Supreme Court of the United States

RACAL SURVEY U.S.A., INC.;
NCS INTERNATIONAL, INC.,
Plaintiff/Counter Defendants-Appellees,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem; *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC.,
Counter Claimant-Appellant.

RACAL SURVEY U.S.A., INC.;
NCS INTERNATIONAL, INC.,
Plaintiffs,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem., *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC., INTERVENOR,
Defendant-Appellant-Cross-Appellee,

v.

INPUT/OUTPUT, INC., INTERVENOR
Plaintiff-Appellee-Cross-Appellant.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Of Counsel
W. J. LARZELERE, JR., T.A.
J. CALVIN BOX
LARZELERE & PICOU, L.L.P.
Suite 1100
Two Lakeway Center
3850 N. Causeway Boulevard
Metairie, LA 70002
(504) 834-6500

DANIEL JOSEPH*
BETH L. HIRSCHFELDER
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Counsel for Petitioners
**Counsel of Record*

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying the existence of a maritime lien on the ground that the supplier seeking the lien had not shown that it had relied on the credit of the vessel, even though the Federal Maritime Lien Act provides that the supplier "is not required to allege or prove . . . that credit was given to the vessel."

2. Whether the court of appeals erred in holding that because materials necessary to a voyage were unilaterally transferred by the charterer from some vessels to other vessels, the materials were not supplied "to a vessel" within the meaning of the Federal Maritime Lien Act, and therefore the supplier of the materials did not have a maritime lien.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court rules 14(1)(b) and 29(6), Petitioner states that the following companies were parties to the proceeding for which review is sought:

1. Racal Survey U.S.A., Inc.
2. NCS International, Inc.
3. Tidewater Marine International, Inc.
4. Input/Output, Inc.

Since the case was initially filed, Racal Survey U.S.A, Inc. and NCS International, Inc., the plaintiffs below, have merged. The new name of Petitioner is Racal NCS, Inc.

Petitioner further states that the parent company of Racal NCS, Inc. is Thales TRC Inc., a wholly-owned subsidiary of Thales Holding Corporation, which itself is a wholly-owned subsidiary of Thales North America, Inc. Thales North America, Inc. is a wholly-owned subsidiary of Thales, S.A. Alcatel, a French corporation, owns 25.29 percent of Thales, S.A. No other publicly-traded company owns 10 percent or more of the stock of Thales, S.A.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF FACTS	3
HISTORY AND DEVELOPMENT OF THE FEDERAL MARITIME LIEN ACT	5
A. The Law Before The Federal Maritime Lien Act	5
B. The Enactment Of The Federal Maritime Lien Act	6
C. The Consideration Of The Federal Maritime Lien Act In The Courts	9
REASONS FOR GRANTING THE PETITION	10
A. The Decision Below Conflicts With Decisions Of Two Other Circuits	11
B. The Fifth Circuit's Decision Creates Non-Uniformity By Imposing A Non-Literal Interpretation Of The FMLA	14
C. Incorrect Interpretation Of This Court's Decisions	17
D. The Decision Below Is Inconsistent With This Court's Holdings On The Meaning Of "Furnished To The Vessel"	19
CONCLUSION	22

TABLE OF CONTENTS—Continued

APPENDIX: Page

Judgment Order, *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, Nos. 98-31382, 98-31383 (United States Court of Appeals for the Fifth Circuit) (October 24, 2000) 1a

Ruling, *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, Civil No. 97-1692 (United States District Court for the Western District of Louisiana) (October 23, 1998) 18a

Amended Ruling, *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, Civil No. 97-1692 (United States District Court for the Western District of Louisiana) (November 20, 1998) 30a

Final Judgment, *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, Civil No. 97-1692 (United States District Court for the Western District of Louisiana) (October 23, 1998) 42a

On Petition for Rehearing En Banc, *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, Nos. 98-31382, 98-31383 (United States Court of Appeals for the Fifth Circuit) (November 20, 2000) 45a

Verified Complaint, *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, Civil No. 97-1692 (United States District Court for the Western District of Louisiana) (August 15, 1997) (without exhibits) .. 47a

TABLE OF AUTHORITIES

CASES: Page

Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962) 11
Crustacean Trans. Corp. v. Atalanta Trading Corp., 369 F.2d 656 (5th Cir. 1966) 16
Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Cal., 310 U.S. 268 (1940) ..... *passim*
Equilease Corp. v. M/V Sampson, 793 F.2d 598 (5th Cir. 1986)..... *passim*
Farrell Ocean Servs., Inc. v. United States, 681 F.2d 91 (1st Cir. 1982)..... 13, 15
Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd., 808 F.2d 697 (9th Cir. 1987) 22
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 11
Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1 (1920) ..... *passim*
Racal Survey U.S.A., Inc. v. M/V Count Fleet, 231 F.3d 183 (5th Cir. 2000) ..... *passim*
Redcliffe Ams. Ltd. v. M/V Tyson Lykes, 996 F.2d 47 (4th Cir. 1993) 22
Silver Star Enter., Inc. v. Saramacca MV, 82 F.3d 666 (5th Cir. 1996) 20
S.C. State Ports Auth. v. M/V Tyson Lykes, 67 F.3d 59 (4th Cir. 1995) 9, 15
S.C. State Ports Auth. v. M/V Tyson Lykes, 837 F. Supp. 1357 (D.S.C. 1993) 16
Stevens Technical Servs., Inc. v. United States, 913 F.2d 1521 (11th Cir. 1990) 12, 13
The General Smith, 17 U.S. 438 (1819) 16
The St. Jago de Cuba, 22 U.S. 409 (1824) 16

CONSTITUTION:

U.S. Const. art. III, § 2, cl. 1 1

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES:	Page
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1333	6
46 U.S.C. § 971	7, 10, 13, 17
46 U.S.C. § 974	16
46 U.S.C. § 31305	2, 8, 15, 16
Federal Maritime Lien Act, 46 U.S.C. §§ 31341—31343 (1988)	*passim*
46 U.S.C. § 31341	1, 7
46 U.S.C. § 31342	*passim*
46 U.S.C. § 31342(a)	19
46 U.S.C. § 31343	7
Federal Maritime Lien Act, Act of June 5, 1920, 41 Stat. 1005	6
Federal Maritime Lien Act, Act of June 23, 1910, 36 Stat. 604	6
Judiciary Act of 1789, § 9, 1 Stat. 77	6
Pub. L. No. 100-710, 102 Stat. 4748 (1988)	7
Pub. L. No. 99-509, 100 Stat. 1913 (1986)	7
Pub. L. No. 98-89, 97 Stat. 500 (1983)	7
LEGISLATIVE MATERIALS:	
H. Rep. No. 98-338 (1983)	7
S. Rep. No. 61-690 (1910)	8, 11
S. Rep. No. 61-831 (1910)	9
SECONDARY MATERIALS:	
Fitz-Henry Smith, Jr., "The Confusion in the Law Relating to Materialmen's Liens on Vessels," 21 Harv. L. Rev. 332 (1907-1908)	6, 16
Fitz-Henry Smith, Jr., "The New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev. 182 (1910-1911)	6, 8

PETITION FOR A WRIT OF CERTIORARI

Racal Survey, U.S.A., Inc. and NCS International, Inc. (collectively "Racal")[1] petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (Pet'r App. 1a-17a) is reported at 231 F.3d 183. The order of the court of appeals denying rehearing (Pet'r App. 45a-46a) is unreported. The district court's ruling (Pet'r App. 18a-29a), amended ruling (to correct a typographical error) (Pet'r App. 30a-41a), and judgment (Pet'r App. 42a-44a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2000 (Pet'r App. 1a-17a) and a timely petition for rehearing *en banc* was denied on November 20, 2000 (Pet'r App. 45a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution art. III, § 2, cl. 1 provides in part:

> The judicial power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .

46 U.S.C. § 31341 provides:

> (a) The following persons are presumed to have authority to procure necessaries for a vessel:

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[1] Racal Survey, U.S.A., Inc. and NCS International, Inc. have recently merged to become Racal NCS, Inc.

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by—

(A) the owner;

(B) a charterer;

(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel.

(b) A person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the vessel.

46 U.S.C. § 31342 provides:

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

46 U.S.C. § 31305 provides:

This chapter does not prevent a mortgagee or other lien holder from waiving or subordinating at any time by agreement or otherwise the lien holder's right to a lien, the priority or, if a preferred mortgage lien, the preferred status of the lien.

STATEMENT OF FACTS

On March 25, 1996, Racal, a supplier of seismic and other equipment and specialized software, entered into an agreement with Coastline Geophysical, Inc. to lease equipment to Coastline for use in a seismic exploration of a portion of the Gulf of Mexico for areas that might be suitable for production of crude oil or natural gas. The leased equipment included computer hardware and software, satellite receivers, radio receivers, and display apparatus, much of which was highly specialized for the operations the vessels would be undertaking. The equipment's primary role was to aid the vessels in the critical function of coordinating seismic information among themselves, and the equipment was appropriate only for use on maritime vessels. The equipment was installed on March 27, 1996 on four vessels belonging to Tidewater Marine, Inc. ("TMI"). Coastline had control over the vessels pursuant to a charter agreement Coastline had executed with TMI in February 1996.

After the termination of that charter, Coastline executed a second charter agreement in August 1996 with Tidewater Marine International, Inc. ("Tidewater"), a company affiliated with TMI. This second charter involved four vessels other than those Coastline had used under the first charter. Coastline transferred the equipment it had leased from Racal to vessels covered by the second charter.

Coastline then became insolvent and defaulted on payments to both Tidewater and Racal. When the vessels returned to the United States, Racal arrested three of them, asserting its rights to a lien against the vessels under the Federal Maritime Lien Act ("FMLA" or "Act"), 46 U.S.C. §§ 31341-31343 (1988). However, Tidewater secured the release of the vessels and disputed Racal's right to a lien.

Racal filed suit in the United States District Court for the Western District of Louisiana, asserting in part that, under the Maritime Lien Act, Racal's furnishing of equipment to the

vessels created a lien in its favor against those vessels. Racal filed a partial motion for summary judgment in which it asked the court to find that it had a valid lien under the Act. Tidewater opposed the motion and filed its own cross-motion for summary judgment. The district court ruled in favor of Racal.

On appeal the United States Court of Appeals for the Fifth Circuit reversed. Relying on its earlier decision in *Equilease Corporation v. Sampson*, 793 F.2d 598 (5th Cir. 1986) (*en banc*), the court of appeals cited deposition testimony of Racal's president[2] to hold that Racal had not relied on the credit of the vessels in supplying the equipment, and therefore that no lien against the vessels was created in Racal's favor. *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, 231 F.3d 183 (5th Cir. 2000) (Pet'r App. 1a-17a). The court did not discuss, and the record does not reveal, whether Racal had even been aware of the existence of the Federal Maritime Lien Act or its protections. Nonetheless the court held that "the testimony explicitly shows that Racal deliberately chose not to rely on the credit of the four chartered vessels" and therefore must have intended to forego the protections of the Act. *Id.* at 190.

The court of appeals also held that a maritime lien was not created in Racal's favor because the equipment was not furnished to the vessels within the meaning of the Federal Maritime Lien Act. The court placed heavy emphasis on the fact that Coastline had transferred the equipment Racal had provided from one set of vessels to another. Relying partially

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[2] In response to the question, "So you weren't relying on credit of Tidewater or any of its vessels" when Racal agreed to supply the equipment, Racal's president stated "Yeah, I mean, our contract was with Coastline. That was our customer." And in answer to the question "you weren't looking to Tidewater or any of its vessels for payment . . . ." Racal's president answered "I had no contract with Tidewater." (Pet'r App. 9a-10a).

on this Court's decision in *Piedmont & George's Creek Coal Company v. Seaboard Fisheries Company*, 254 U.S. 1 (1920), the court held that the equipment was therefore not provided exclusively to the vessels Coastline obtained under the second charter agreement with TMI, and that this fact defeated the creation of a lien on those vessels. (Pet'r App. 13a-16a).

On November 20, 2000 the Fifth Circuit rejected a timely filed petition for rehearing. (Pet'r App. 45a-46a).

HISTORY AND DEVELOPMENT OF THE FEDERAL MARITIME LIEN ACT

A. The Law Before The Federal Maritime Lien Act

The law of maritime liens arose out of the unique needs of the maritime industry. Because their function is transient, ships routinely find themselves in distant ports, and often in need of supplies, equipment, repairs, and other materials to sustain their ability to function. But suppliers and merchants were often reluctant to provide such equipment, repairs, or other items of value to a vessel that would soon depart, as there was no way to assure payment. As a result, vessels often encountered difficulty in obtaining "necessaries" for their journeys. As this Court noted in *Piedmont*:

> [A ship] is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners and without any large amount of money, it is essential that she should be self-reliant – that she should be able to obtain upon her own account needed repairs and supplies.

Piedmont, 254 U.S. at 9. Generally, therefore, a maritime lien against the vessel arose in favor of anyone who supplied necessaries to it, thus encouraging the supply of things needed by vessels visiting their ports and aiding the development of maritime commerce.

Prior to the initial enactment of the Federal Maritime Lien Act in 1910, maritime liens were a creature of state law (even though they could be enforced against the vessel exclusively in federal court under the federal maritime jurisdiction; *see* Judiciary Act of 1789, § 9, 1 Stat. 77, now codified at 28 U.S.C. § 1333). The general rule was that a lien against a vessel was created in favor of a supplier simply by the act of supplying such necessaries to a vessel. Under some decisions there were two noteworthy exceptions: no lien was created where either (1) the vessel owner personally obtained the necessaries, or (2) the necessaries were obtained in the vessel's home port. In such situations, the supplier of necessaries was presumed to be relying on the owner's personal credit, rather than the credit of the vessel. *See generally,* Fitz-Henry Smith, Jr., "The New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev. 182 (1910-1911). However, as noted in an article published several years prior to the enactment of the Federal Maritime Lien Act (and cited with approval by this Court in *Piedmont*, 254 U.S. at 12, n.3) there were inconsistencies in the law of the several states, including with respect to the scope of these exceptions. *See* Fitz-Henry Smith, Jr., "The Confusion in the Law Relating to Materialmen's Liens on Vessels," 21 Harv. L. Rev. 332 (1907-1908).

B. The Enactment Of The Federal Maritime Lien Act

In 1910 Congress passed the "Act relating to liens on vessels for repairs, supplies, or other necessaries," Act of June 23, 1910, 36 Stat. 604, which created a single and uniform federal standard to replace state law. The Act codified the doctrine that the supplying of necessaries to a vessel creates a lien against that vessel, regardless of whether the necessaries were obtained in the vessel's home port or whether the owner was present. Congress reenacted the law in a substantially equivalent form in 1920, under the name "Federal Maritime Lien Act." Act of June 5, 1920, 41 Stat.

1005. Between 1983 and 1988, Congress reorganized the original statutory provisions when it enacted major revisions to the federal maritime laws, including the law of maritime liens. Pub. L. No. 98-89, 97 Stat. 500 (1983); Pub. L. No. 99-509, 100 Stat. 1913 (1986); Pub. L. No. 100-710, 102 Stat. 4748 (1988). Those revisions did not alter the substance of the Federal Maritime Lien Act,[3] the heart of which provides that:

> [A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) *is not required to allege or prove in the action that credit was given to the vessel.*

46 U.S.C. § 31342 (emphasis added).[4] The Act also describes the individuals who are "presumed to have authority to procure necessaries for a vessel," 46 U.S.C. § 31341, and creates a mechanism for a person claiming a lien on a preferred mortgage vessel to record that lien. 46 U.S.C. § 31343. The law also includes a provision under which a supplier of necessaries may waive his or her right to a lien:

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[3] The primary purpose of the 1988 law was to bring together "a confusing collection of individual statutes enacted over a period of nearly two centuries" in a more organized fashion, "to make it more understandable for everyone involved." H. R. Rep. No. 98-338 (1983).

[4] Prior to the 1988 law, this provision was codified at 46 U.S.C. § 971, and read: "Any person furnishing . . . necessaries . . . to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, *and it shall not be necessary to allege or prove that credit was given to the vessel.*" (emphasis added). Some of the cases discussed herein were decided prior to the passage of the 1988 Act, and so refer to 46 U.S.C. § 971 instead of its current codification at 46 U.S.C. § 31342.

"This chapter does not prevent a mortgagee or other lien holder from waiving or subordinating at any time by agreement or otherwise the lien holder's right to a lien, the priority or, if a preferred mortgage lien, the preferred status of the lien." 46 U.S.C. § 31305.

Congress had several purposes in enacting the FMLA: (1) to "do away with the artificial distinction between foreign and domestic vessels[5] and put on the same footing necessaries furnished in the home State and necessaries furnished in foreign ports or States." S. Rep. No. 61-690 (1910), (2) to eliminate the exception that prevented the creation of the lien when the vessel owner personally obtained the necessaries, and (3) to impose uniformity in the law of maritime liens. *See, e.g., Piedmont,* 254 U.S. at 11. A scholarly article appearing contemporaneously with the passage of the Act, and later cited with approval by this Court, *see Piedmont*, 254 U.S. at 12, n.3, states that the Act abolished "the distinction between domestic and foreign ports and with the presumption once said to attach to the owner's presence in any port" and that, given those changes, "the requirement of proof that the vessel was credited seemed unnecessary and, if retained, more apt to continue the confusion which it was the express purpose of the Act to avoid." Fitz-Henry Smith, Jr., "New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev. 182, 189-190 (1910-1911). That article also states that under the Act, "the burden is on the person *disputing* the lien to show that the same has been waived." *Id.* at 190 (emphasis added).

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[5] The word "foreign" refers not just to vessels from foreign countries, but also to vessels from states other than the state where the necessaries were supplied; the word "domestic" refers to vessels whose home port is in the state where the necessaries are supplied. *See* Fitz-Henry Smith, Jr., "The New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev. 182, 184 (1910-1911).

C. The Consideration Of The Federal Maritime Lien Act In The Courts

This Court had occasion to consider the Federal Maritime Lien Act in *Piedmont & George's Creek Coal Company v. Seaboard Fisheries Company*, 254 U.S. 1 (1920). In that case, Piedmont had furnished coal to a shipping company; some of the coal would be used on the company's vessels and some would be used in the company's shoreside factories. The question was whether this supply of coal to the shipping company constituted furnishing necessaries to vessels. In discussing the Act, this Court observed (per Brandeis, J.) that if the coal was deemed to be furnished to the vessels, "maritime liens would have arisen and could have been established under the statute without proof that credit was given to the vessels." *Id.* at 10. The Court also said, in describing the Act, that with the three exceptions noted above, the Act "makes 'no changes in the general principles of the law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.'" *Id.* at 11-12, *quoting* S. Rep. No. 61-831 (1910). However, these statements were dicta because the Court held that the coal was not supplied to vessels within the meaning of the Act (given that, at the time of delivery, it could not be determined whether the coal would be consumed on vessels or at a factory). *Piedmont*, 254 U.S. at 7-8, 13. The Court repeated this dictum in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California*, 310 U.S. 268, 271-272 (1940), a case that also involved the question of whether necessaries had been furnished to a vessel. Since its 1940 decision in *Dampskibsselskabet*, this Court has not decided any case concerning the entitlement to a lien under the Act. *See, e.g., S.C. State Ports Auth. v. M/V Tyson Lykes*, 67 F.3d 59, 62 (4th Cir. 1995) ("The Supreme Court has not taken up the subject [of entitlement to a lien] since the Oil Co. [i.e., *Dampskibsselskabet*] case . . . .").

In 1986, the Fifth Circuit decided *Equilease Corporation v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986) (*en banc*), holding, over a sharp dissent by Judge Davis, that evidence indicating that the supplier of the necessaries had relied solely on the credit of the vessel's owner, and not of the vessel itself, defeated the supplier's right to a lien. The Fifth Circuit acknowledged that "Equilease's argument at first appears to be contrary to the express language of the FMLA," which states that it is not necessary to allege or prove that credit was given to the vessel. *Id.* at 605. The Fifth Circuit supported its non-literal reading by citing this Court's opinion in *Piedmont*: "Piedmont held that the relevant language in the Act served only to remove from the creditor the burden of proving that he had relied on the credit of the vessel. The presumption that the vessel's credit was relied upon . . . was [now] granted to '[a]ny person'" regardless of whether the vessel was in its home port. *Id.* at 605, quoting 46 U.S.C. § 971. Relying on this Court as having held that the Act had such a limited function, the Fifth Circuit continued, "*[d]espite* the language of the Act, the idea of credit to the vessel being a prerequisite to a lien, and the concomitant principle that credit to the owner negates the lien, are still very much with us today." *Id.* at 605 (emphasis added). In the present case, the court of appeals relied directly on this language from its earlier decision in *Equilease* in refusing to recognize the creation of a lien in Racal's favor under the Federal Maritime Lien Act.

REASONS FOR GRANTING THE PETITION

Relying virtually exclusively on dicta from, and misreadings of, decisions of this Court in *Piedmont* and *Dampskibsselskabet*, the Fifth Circuit's decision (1) conflicts with decisions of at least two other circuits, creating non-uniformity such that a vessel may choose the law applicable to it respecting the existence of maritime liens by choosing the ports into which it sails and (2) applies what the Fifth Circuit recognizes is non-literal reading of a critical provision

of the FMLA, sowing confusion and uncertainty where Congress intended simplicity and uniformity. This Court should grant certiorari to settle the important issues of maritime law here presented, resolve the conflict among the circuits, and vindicate Congress's goal in enacting the FMLA.

As this Court's decision in *Piedmont* shows, the issue is important—indeed, crucial—to the shipping industry. The Court there noted that because a vessel is subject to "vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished . . . it is essential that she should be self-reliant—that she should be able to obtain upon her own account needed repairs and supplies." *Piedmont*, 254 U.S. at 9. The law of maritime liens was developed to "protect the ship," *id.* at 8, and allow it to obtain critical repairs and supplies; a decision that both adversely affects the availability of maritime liens and renders the law non-uniform, as does the decision below, merits review.

A. The Decision Below Conflicts With Decisions Of Two Other Circuits

Uniformity is particularly important in the area of maritime law. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 230 (1986); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 118 (1962). The need for uniformity is easy to see here: because "the ship's function is to move from place to place," *Piedmont*, 254 U.S. at 9, it is of particular importance that transactions undertaken with respect to a vessel in one place have the same consequences and impacts regardless of where the vessel goes. A vessel should not have the choice of being subject to a lien if it sails into one port but not if it sails into another. Indeed it was Congress's goal in enacting the FMLA to render the law applicable to maritime liens uniform, comprehensive, and easily applied. *See, e.g.*, S. Rep. No. 61-690 (1910) (the Act "is designed to remove the confusion

now existing in an important branch of the admiralty jurisprudence of the United States by simplifying the law and making it uniform throughout the country"); *Dampskibsselskabet*, 310 U.S. at 271-72 (the statute "provided a series of simple and comprehensive rules" to "simplify and clarify the rules as to maritime liens, as to which there had been much confusion"). Under the Fifth Circuit decision, however, it is clear that whether Petitioners had a valid maritime lien would have been decided differently in at least the Eleventh and First Circuits. Each of those Circuits holds that evidence of the very kind deemed dispositive by the Fifth Circuit in determining that no lien exists is utterly irrelevant. The Fifth Circuit's decisions, which accept evidence that the supplier of necessaries did not rely on the credit of the vessel and refuse to recognize liens on that basis, are in direct conflict with decisions from other Circuits.

In *Equilease*, the Fifth Circuit held that "[d]espite the language of the Act [which provides that the supplier 'is not required to allege or prove . . . that credit was given to the vessel'], the idea of credit to the vessel being a prerequisite to a lien, and the concomitant principle that credit to the owner negates the lien, are still very much with us today." *Equilease*, 793 F.2d at 605. Further, the Fifth Circuit held, a party can challenge the existence of a lien by "establishing that the personal credit of the owner or charterer was solely relied upon." *Id.* It was on this holding that the court of appeals based its refusal in the present case to recognize a maritime lien, placing entire reliance on two bits of deposition testimony in which the president of Racal agreed with his questioner that he was "not relying on" or "looking to" the credit of Tidewater or any of its vessels when entering into the contract with Coastline (*see* footnote 2, supra). The Fifth Circuit held that this testimony established that "Racal did not rely on the credit of the vessels," (Pet'r App. 12a), which was in its view sufficient to defeat the lien.

The law in other circuits is decisively to the contrary. In *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521 (11th Cir. 1990), the Eleventh Circuit refused even to consider exactly the same kind of evidence as that on which the Fifth Circuit decision turned—evidence that the supplier of necessities had expected to be paid by the contracting party rather than relying on the vessel's credit. The Eleventh Circuit held that "[e]xpectations that payment for the service would be made by some party other than the vessel does not vitiate a lien by one who, as permitted under § 971 [of the FMLA], is not required to prove reliance on the credit of the vessel." *Id.* at 1536. In the present case, as we have seen, the Fifth Circuit relied on this very evidence—in the form of the testimony of the subjective belief of the supply company's president—in refusing to recognize a lien. Thus the two circuits fundamentally disagree about whether evidence that the party supplying the necessaries relied on something other than the credit of the vessel can defeat the creation of a maritime lien. The Fifth Circuit finds such evidence decisive, and the Eleventh Circuit finds it irrelevant.

The First Circuit's decision in *Farrell Ocean Services, Inc. v. United States*, 681 F.2d 91 (1st Cir. 1982) is also in fundamental conflict with the Fifth Circuit's holding. There, a party sought to defeat the existence of a lien with evidence allegedly showing that the supplier of necessities had looked for payment to the person seeking repairs on the vessel rather than the vessel itself. *Id.* at 93. Rejecting this argument, the First Circuit held that evidence simply showing reliance on another party for payment was insufficient to defeat a lien, and that "[t]he party entitled to the lien must have taken *affirmative actions* that manifest a clear intention to forego the lien." *Id.* at 94 (emphasis added). The court stressed that "affirmative, protective action" is necessary to show waiver of the maritime lien, even where the supplier was aware of the recipient's precarious financial position, supplied a bill to

the owner's agent rather than the owner of the vessel, and accepted partial payment. *Id.*

Again the Fifth Circuit's holding is in conflict. The Fifth Circuit here held that testimony of the subjective lack of intention to charge the vessel by Racal's president—without any "affirmative, protective action"—was sufficient to defeat a lien. Indeed, the conflict on this point could hardly be more clear. Racal had argued that the testimony the Fifth Circuit found decisive "does not specifically indicate that Racal planned to waive the lien and rely solely on the credit of a party other than the vessel," and that therefore Racal had a lien. (Pet'r App. 10a). This precise argument was what prevailed in the First Circuit. But the Fifth Circuit rejected this position, concluding that the evidence that Racal's president did not intend to rely on the vessel's credit was sufficient to establish, "as a matter of law, [that the supplier] purposefully intends to forego its right to claim a maritime lien." *Racal*, 231 F.3d. at 189, 190.

Thus, the decisions of at least two other circuit courts of appeals—the Eleventh Circuit and the First Circuit—conflict with the Fifth Circuit's decision in *Racal* on this important issue. This Court should grant certiorari to resolve this conflict.

B. The Fifth Circuit's Decision Creates Non-Uniformity By Imposing A Non-Literal Interpretation Of The FMLA

The Federal Maritime Lien Act mandates that a lien is created simply by the supply of necessaries to the vessel and specifically states that in order to enforce the lien, the supplier "is not required to allege or prove in the action that credit was given to the vessel." 46 U.S.C. § 31342. Thus, once a person supplies necessaries to a vessel, that person automatically has a maritime lien, and evidence of reliance on

the credit of something other than the vessel is not relevant to whether a lien has arisen.

The Fifth Circuit's holding, however, requires what the Act says is not required. The decision below and the *Equilease* decision hold that, even if a person supplies necessaries to a vessel, that person does *not*, in fact, have a lien if evidence shows that he or she did not intend to rely on the credit of the vessel. In fact, the Fifth Circuit recognizes that these holdings conflict with the plain language of the Act, and that it accepts as dispositive the subjective state of mind of the supplier's president "*[d]espite* the language of the Act . . . ." *Equilease*, 793 F.2d at 605 (emphasis added). The court of appeals also described credit to the vessel as a "prerequisite" to a maritime lien, *id.*, when the Act itself says the only "prerequisite" to a maritime lien is that a person furnish necessaries to a vessel. Thus, the Fifth Circuit has contradicted existing statutory language and effectively grafted additional language onto the Act.

The Act does provide for waiver of its protections, stating that a person who already has a lien can waive it: "[t]his chapter does not prevent a . . . lien holder from waiving or subordinating at any time by agreement or otherwise the lien holder's right to a lien . . . ." 46 U.S.C. § 31305. However, as the First Circuit held in *Farrell*, § 31305 requires an actual affirmative waiver—not just after-the-fact testimony about the subjective intent of an employee of the company supplying the necessaries. *Farrell*, 681 F.2d at 93-94; *see also S.C. State Ports Auth. v. M/V Tyson Lykes*, 67 F.3d 59 (4th Cir. 1995) (holding that the supplier's taking of additional security does not relinquish its right to maritime lien on the vessels).[6]

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[6] *South Carolina State Ports Authority* is also notable because, although it was a waiver case decided after *Equilease*, the court did not cite to *Equilease*. Indeed, the district court decision in that case, also

More significantly, the Fifth Circuit plainly did *not* base its holding on § 31305—or even suggest that it might be relevant—in either *Equilease*[7] or the present case. As just noted, § 31305 provides that a lien holder can waive the lien, while the Fifth Circuit doctrine is that without reliance on the vessel's credit, a lien does not even arise. The Fifth Circuit has thus created a new and different doctrine, under which supplying necessaries to a vessel does not give rise to a maritime lien—i.e., where the party opposing the lien introduces evidence that the supplier relied on something other than the credit of the vessel. But this means of defeating a lien does not appear anywhere in the Act and, as the court of appeals acknowledged, departs from the language of the Act.[8]

In fact, the Fifth Circuit's decisions undo the work of Congress. The FMLA was enacted in part to clear up the confusion surrounding the issue of when the supplier relied on the credit of the vessel and when he or she relied on the credit of the owner. Prior to the enactment of the statute, federal courts struggled with the question of when the supplier of necessaries had a lien. *See, e.g., The General Smith*, 17 U.S. 438 (1819); *The St. Jago de Cuba*, 22 U.S. 409 (1824); Fitz-Henry Smith, Jr., "The Confusion in the Law Relating to Materialmen's Liens on Vessels," 21 Harv. L. Rev. 332 (1907-1908). The statute effected its clarification

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ignoring *Equilease*, cites to a *previous* decision of the Fifth Circuit, *Crustacean Transportation Corp. v. Atalanta Trading Corp.*, 369 F.2d 656 (5th Cir. 1966), for the proposition that services are presumptively provided on the credit of the vessel. *S.C. State Ports Auth. v. M/V Tyson Lykes*, 837 F. Supp. 1357 (D.S.C. 1993).

[7] At the time *Equilease* was decided, the waiver provision was located at 46 U.S.C. § 974.

[8] Further, in holding that a supplier's non-intention to rely on a vessel's credit is as effective as waiver of a lien under § 31305, the Fifth Circuit is essentially holding that the waiver provision of § 31305 is surplusage.

by unequivocally abolishing all requirements and presumptions having to do with whether or not the supplier relied on the credit of the vessel. The Fifth Circuit's decisions reintroduce this confusion into the law of maritime liens, by unnecessarily and inappropriately reintroducing prerequisites to the creation of a lien, and by muddying the distinction between prerequisites to the lien and waiver of an existing lien.[9] This Court should grant certiorari to return the law to the simplified and clarified state Congress had intended it to occupy (as the Court recognized in *Dampskibsselskabet*, 310 U.S. at 271-72).

C. Incorrect Interpretation Of This Court's Decisions

To support its non-literal reading of the FMLA, the Fifth Circuit relied exclusively, as we have seen, on its interpretation of this Court's opinion in *Piedmont*. The Fifth Circuit's reading is incorrect, and this Court should grant certiorari to rectify it.

In *Equilease*, the Fifth Circuit asserted that "Piedmont held that the relevant language in the Act served only to remove from the creditor the burden of proving that he had relied on the credit of the vessel." *Equilease*, 793 F.2d at 605. This was that court's sole basis for its conclusion—later repeated in *Racal*—that a maritime lien can be defeated merely by showing that the supplier of necessaries had relied on something other than the credit of the vessel. But *Piedmont* held no such thing, and did even state it in dictum. The Fifth Circuit's reading of *Piedmont* distorts this Court's statements in a manner that significantly weakens the protections the Act

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[9] Indeed, the dissenting judges in *Equilease*, per Davis, J., stated that the Fifth Circuit's decision there "overrules at least twenty-five years of established law in this circuit and creates serious practical problems in the enforcement of maritime liens." *Equilease*, 793 F.2d at 607 (Davis, J., dissenting).

is supposed to provide to suppliers of necessaries and, therefore, to the vessels themselves.

In *Piedmont*, the issue was whether coal had been supplied "to any vessel," 46 U.S.C. § 971, within the meaning of the Act, where the supplier had furnished coal to a company for use in both its factories and on its vessels. It was recognized that at common law such activity did not give rise to a maritime lien because the supply was for land-based as well as maritime uses. This Court's holding was that the coal supplier did not furnish coal to the vessel within the meaning of the Act and that, in enacting the FMLA, Congress had not intended to expand the maritime lien to reach such a situation. In this context, this Court reviewed Congress's three purposes in enacting the law—to abolish the foreign port / domestic port distinction, to abolish the exception for the owner's presence, and to unify the law of maritime liens. This Court then went on to describe the statute's effect:

> The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner, but in no way lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner or of some one acting by his authority.

Piedmont, 254 U.S. at 12. Nothing in this statement—or any other statement in *Piedmont*—holds or otherwise indicates that the Act merely creates a presumption of credit to the vessel that can be overcome by introducing evidence that the supplier relied on something other than the credit of the vessel. In *Piedmont*, this Court discussed the Act's alleviation of the burden of proving reliance on the credit of the vessel solely in connection with its explanation that the supplier still has the burden of showing that the supplies were furnished upon the order of someone having the authority to bind the vessel.

In sum, *Piedmont* does not support the holdings in *Equilease* or *Racal*. Far from it. In *Piedmont* the Court appears to reject, in further dicta, the rationale on which the Fifth Circuit relied:

> The fact found by the lower courts that the parties understood the law would afford a lien on the vessels . . . is, in this controversy, *without legal significance*. If the coal had been furnished to the several vessels by the libelant, maritime liens would have arisen and could have been established under the statute *without proof that credit was given to the vessels*.

254 U.S. at 10 (emphasis added). The decision below, however, faulted Racal for failing to provide evidence that Racal had intended to rely on the credit of the vessels, and instead, repeated the *Equilease* holding that the "idea of credit to the vessel [is] a prerequisite to a lien." (Pet'r App. 9a). This Court should review the *Racal* decision to correct this misreading of its precedent, eliminate the resulting confusion in the law, and reinstate the protection the FMLA provides to suppliers and vessels.

D. The Decision Below Is Inconsistent With This Court's Holdings On The Meaning Of "Furnished To The Vessel"

In the second issue on which the court below rested, the Fifth Circuit reached a decision on when necessaries are "provid[ed] . . . to a vessel" that presents an important holding that is inconsistent with this Court's rationales in *Piedmont* and *Dampskibsselskabet* and should also be reviewed. As noted above, the seismic equipment was not supplied exclusively to the first set of vessels in question, but instead was transferred by the charterer Coastline to other vessels owned by Tidewater. This, the Fifth Circuit held, was not the supply of necessaries "to a vessel," 46 U.S.C. § 31342(a) under the Act, and also defeated a lien. This

holding that the charterer's unilateral moving of necessaries from one vessel to another defeats a maritime lien is unprecedented; if it is permitted to stand, the result will be considerable uncertainty about the availability of maritime liens when necessaries are furnished to more than one vessel or moved from vessel to vessel—common activities.

The court of appeals pointed to *Piedmont* as "[t]he seminal case" on the meaning of the phrase in the Act "providing necessaries to a vessel," 46 U.S.C. § 31342. While this is correct, *Piedmont* provides no support for the Fifth Circuit's holding. Indeed, its rationale points in the opposite direction. In *Piedmont*, a coal company had supplied coal to a shipping company, which used the coal both in its factories and on its ships. The Court held that the coal company had supplied coal to the shipping company, and that the shipping company itself had furnished the coal both to its vessels and its non-maritime factories. On these facts, the Court held that the coal company did not supply necessaries to the vessels, and that no maritime lien was created. The Fifth Circuit also relied on its own decision, *Silver Star Enterprises, Inc. v. Saramacca MV*, 82 F.3d 666 (5th Cir. 1996), where the necessaries were cargo containers that, like the coal in *Piedmont*, "could be used intermodally on land as well as on numerous vessels." *Id.* at 669.

Thus, in *Piedmont* and *Silver Star*, the gravamen of the holding was that at the time of the supply that created the claim of a lien, the necessaries had both non-maritime and maritime uses, and that there had not been the identification of the supplies to vessels that is necessary to assure that a maritime lien was justified. In the present case, however, there was never any doubt that the equipment was supplied for use in vessels, because it was never put to a non-maritime use and indeed has no such use. And where there is no dispute that the necessaries in question have no non-maritime use, there is no reason to require that it be identified as for use

in specific vessels. The Act certainly does not impose this requirement. Instead, it states that a lien is created whenever a person furnishes necessaries "to a vessel." 46 U.S.C. § 31342.

The Fifth Circuit's holding that a lien arises only when the underlying agreement provides for delivery of the necessaries to specifically identified vessels rather than to vessels identified by a more general description also appears to be contrary to this Court's decision in *Dampskibsselskabet*. There, this Court described the agreement to provide the necessaries at issue as a "general contract to supply the fuel oil requirements of any and all vessels owned, chartered, or operated by" the charterer. *Dampskibsselskabet*, 310 U.S. at 276 (internal quotations omitted). The Court also observed that "the oil was supplied exclusively for the vessels in question, was delivered directly to the vessels and was so invoiced . . . ." *Id.* at 277. Although the "general" nature of the agreement to supply fuel oil to "any and all" of an unspecified (and possibly fluctuating) number of vessels was clearly known to the Court, the Court was not concerned that the failure of the agreement to identify specific vessels might preclude the existence of a valid lien. The clear result of the Court's discussion is that identification of the specific vessels to which the necessaries are to be provided is not important as long the necessaries are in fact furnished to the vessels contemplated by the contract.

The Fifth Circuit provided two reasons for its determination that *Dampskibsselskabet* did not control the present case. First, the court held that this Court's statements regarding furnishing necessaries to the vessels were dicta (Pet'r App. 15a), directed to an argument that the contract provisions demonstrated an intent to rely on the charterer's credit rather than that of the vessels, and that this Court did not address them to the issue of whether the supplier had furnished oil to the vessels. But this holding appears to be

incorrect and is itself in conflict with the decisions of at least two other courts of appeals, the Fourth Circuit and the Ninth Circuit. Both *Redcliffe Americas Ltd. v. M/V Tyson Lykes*, 996 F.2d 47, 50 (4th Cir. 1993) and *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 701-02 (9th Cir. 1987) characterized the disputed portion of *Dampskibsselskabet* as a holding on the issue of what constitutes the furnishing of necessities to a vessel.[10]

The Fifth Circuit also rejected the applicability of *Dampskibsselskabet* because, it asserted, the fact that Coastline had control over which vessels received the equipment renders the case more like *Piedmont* and *Silver Star* than like *Dampskibsselskabet*. But, as explained above, both of those cases involved the furnishing of necessaries that could be, and in fact were, used for non-maritime as well as maritime purposes. That was not true here. The confusion of the courts of appeals on this important issue and the need for this Court to elucidate its prior opinions show that this Court should grant review on this issue as well.

CONCLUSION

In sum, the Fifth Circuit's decision is based on a misreading of this Court's case law, conflicts with decisions other circuits have rendered, and undoes and sows confusion with respect to the reach and effect of the Federal Maritime Lien Act. This Court should grant certiorari to review and correct these errors and to reestablish uniformity in federal maritime law.

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[10] It is worthy to note that the courts of appeals whose decisions have resulted in the conflicts described here and in section A above—the First, Fourth, Fifth, Ninth, and Eleventh Circuits—represent the circuits where most of the major U.S. ports are located, and therefore most frequently decide significant issues of maritime law. Thus, inconsistency and lack of clarity are significant.

Respectfully submitted,

Of Counsel
W. J. LARZELERE, JR., T.A.
J. CALVIN BOX
LARZELERE & PICOU, L.L.P.
Suite 1100
Two Lakeway Center
3850 N. Causeway Boulevard
Metairie, LA 70002
(504) 834-6500

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DANIEL JOSEPH *
BETH L. HIRSCHFELDER
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for Petitioners

* *Counsel of Record*